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DEMAND ON PRINCIPAL BEFORE ACTION AGAINST GUARANTOR.

The statement that a demand upon the principal for performance of his contract, must be made, as a condition precedent to an action against the guarantor, is so often made by the courts that the question, when a demand is necessary in order to fix the guarantor's liability, is one of importance.

The general rule applying to demand is, that it is required only to place the party upon whom it is made in default. If he is already in default there is no necessity for a demand upon him to perform his contract, and such formality is meaningless.

In contracts where both parties are to perform acts dependent upon each other, or in which the conditions are concurrent, demand before suit, is required, as otherwise the plaintiff is unable to show that he is himself in a better position to complain of the defendant, then the defendant is to complain of him. But when the contract is by one to pay money to another, whose duty is only to receive it, the authorities agree that no demand by the payee is necessary before he can sue, but that, on the other hand, the duty is upon him who has promised payment to seek the other party and tender payment to him.[1]

Even when the promise is to pay money on demand, it is generally held that no demand is necessary as a condition precedent to an action on the promise. Courts say that in such a promise the debt is immediately due, and the suit thereon is a sufficient demand.[2]

It may well be asserted that in all cases in ordinary contracts, where a demand is required to put the opposite party in default, under similar conditions in contracts of

[1] Nelson *v.* Bostwick (N. Y. 1843) 5 Hill 37; Quimby *v.* Lyon (1883) 63 Cal. 394; Clarke *v.* Charter (1880) 128 Mass. 483; Princeton *v.* Gebhart (1878) 61 Ind. 187; Lake Ontario &c. Co. *v.* Mason (1857) 16 N. Y. 451; Deel *v.* Berry (1858) 21 Tex. 463; 73 Am. Dec. 236.

[2] Cotton *v.* Reavill (Ky. 1810) 2 Bibb. 99; Ross *v.* Lafayette & I. R. Co. (1855) 6 Ind. 297; Dyer *v.* Rich (Mass. 1840) 1 Metc. 180; Locklin *v.* Moore (1874) 57 N. Y. 360; Miss. & T. R. R. Co. *v.* Green (Tenn. 1872) 9 Heisk. 588; Nelson *v.* Bostwick (N. Y. 1843) 5 Hill 37; 40 Am. Dec. 310.

guaranty, a demand must be made upon the principal, and notice of this demand given to the guarantor, as a condition precedent to an action against him on his contract of guaranty. On this proposition there is perhaps no dispute. But the proposition conversely stated, that demand on the principal will not be required, except in those cases where generally a demand is necessary to place the other party to the contract in default, while apparently logical, is disputed in many jurisdictions. In California it is said that the liability of a guarantor is the same as that of an indorser, and that demand on the maker of a note is required to fix the liability of the guarantor.[1]

Judge Story in his Treatise on Promissory Notes,[2] says: "The guarantor contracts, upon the dishonor of the note, that he will pay the amount *upon a presentment* being made to the maker, and notice given him of the dishonor of the note within a reasonable time."

In Massachusetts it is held that the guarantor of a promissory note is discharged by the neglect of the holder to demand payment of the maker provided the maker was solvent when the note fell due, and afterward became insolvent. But it is also there said that the same strictness of proof as to the demand and notice, is not necessary to charge a guarantor as is required to charge an indorser.[3]

In the American and English Enc. of Law,[4] it is said: "That by the prevailing authority the general rule may be stated to be, that where the guaranty is collateral and not absolute, a demand upon the principal is a prerequisite to an action against the guarantor, in the absence of circumstances amounting to a waiver or an excuse." In the American Digest,[5] it is said that "Demand of the principal is necessary to charge a guarantor of future transactions." On the same page it is said that "if the guaranty is conditional, demand upon the principal must be made within a reasonable time."

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[1] Riggs *v.* Waldo (1852) 2 Cal. 485; 56 Am. Dec. 356; Lightstone *v.* Laurencel (1854) 4 Cal. 277; Pierce *v.* Kennedy (1855) 5 Cal. 139.

[2] ¶ 472.

[3] Oxford Bank *v.* Haynes (Mass. 1829) 8 Pick. 423; Talbot *v.* Gay (Mass. 1836) 18 Pick. 534, citing Warrington *v.* Furbor (1807) 8 East 242; Nicholson *v.* Gouthit (1796) 2 H. Bl. 609.

[4] (2nd ed.) Vol. 9, p. 206. [5] Vol. 25, p. 131.

Many authorities are cited to sustain these propositions, nearly all of which appear to be in point.[1]

In Ohio, as in many of the other States, the courts became involved with this question. In Green *v.* Dodge[2] the court held that a guarantor of payment of a promissory note cannot be charged unless payment be demanded of the maker, when due, and notice of nonpayment be given to the guarantors. But not until 1841 in Parker *v.* Riddle[3] do we find a record of the real situation of that court on account of the discussion of this question. At page 108 the opinion proceeds as follows: "One member of the court holds the promise as original. The majority, however, hold it to be collateral, and subject in some degree, to the usage of mercantile law as applied to the indorser of mercantile paper. It is holden by two of the judges that a demand upon the maker, when such note becomes due, and reasonable notice to the indorser would be necessary to charge the defendant as a guarantor. All unite in the opinion that the name of the payee in blank, appearing upon the note, is not a guaranty, but an indorsement, while the name of a person, out of the note, appearing upon it would be a guaranty. In such case, a majority of the court are of opinion to charge the guarantor, demand of payment must be made when the note becomes due, and notice, before suit brought, given to the guarantor; while one member holds that the guarantor is not liable, unless the maker be prosecuted to insolvency and notice thereof given to the guarantor."

Later cases in Ohio[4] have practically solved the difficulties here suggested. In Forest *v.* Stewart[5] the court said that the law merchant which defines the terms of the

[1] Douglas *v.* Reynolds (U. S. 1833) 7 Peters 113; Lane *v.* Levillian (1842) 4 Ark. 76; 37 Am. Dec. 769; Read *v.* Cutts (Me. 1831) 7 Greenl. 186; 22 Am. Dec. 184; McCollum *v.* Cushing (1861) 22 Ark. 540; Rankin *v.* Childs (1846) 9 Mo. 673; Sage *v.* Wilcox (1826) 6 Conn. 81; March *v.* Putney (1875) 56 N. H. 34; Hernandez *v.* Stilwell (N. Y. 1878) 7 Daly 360; Lewis *v.* Harvey (1853) 18 Mo. 74; 59 Am. Dec. 286; Benton *v.* Gibson (S. C. Law 1833) 1 Hill 56; Rhodes *v.* Morgan (Tenn. 1872) 1 Baxter 360; Cox *v.* Brown (N. C. 1858) 6 Jones 100; Bashford *v.* Shaw (1854) 4 Ohio St. 263; Virden *v.* Ellsworth (1860) 15 Ind. 144; Dole *v.* Young (Mass. 1837) 24 Pick. 250; Howe *v.* Nickels (1842) 22 Me. 175.

[2] (1825) 2 Ohio 436. [3] 11 Ohio 102.

[4] Forest *v.* Stewart (1863) 14 Ohio St. 246; Clay *et al. v.* Edgerton (1869) 19 Ohio St. 549.

[5] Supra.

implied contract, created by the indorsement and delivery of commercial paper and the consequent rights and obligations of the parties thereto, can have little or no application to the case of a special assignment and guaranty. But in New York, in Allen *v.* Rightmere,[1] the court said that proof of demand and notice were not necessary, that it was the duty of the debtor to seek the creditor and pay the debt on the very day it became due. It was there said that a demand is necessary only to fix the liability of an indorser or a surety whose undertaking is conditional; and that no demand is required to fix the liability of a guarantor.

What can be the purpose of making a demand upon a principal who is already in default, that is, upon one whose debt is already past due? A demand of payment made upon him does not change his position toward the creditor, nor does it in the slightest degree change the creditor's position toward him. He was in default and could have been sued before demand, and hence no advantage has been gained by the demand.

If the guaranty referred to an indorser of commercial paper, guaranteeing that he would pay in accordance with his contract as indorser, then it would be incumbent upon the holder of the paper to demand payment of the maker when the paper fell due and to give notice to the indorser before he could be held. Such steps therefore would be necessary to hold his guarantor. But in none of the cases requiring demand upon the principal was this question of so holding an indorser involved.

It is settled law that in many contracts of guaranty notice of the principal's default must be given the guarantor in order that he may protect himself against the principal. Now suppose the principal failed to pay when his obligation fell due, and the creditor duly notified the guarantor of this fact, may the guarantor when sued plead that while he was notified of the principal's failure to pay, he is nevertheless not responsible, because the creditor failed to make demand upon the principal? No court would sustain this position. But if not, why will courts require a demand except where it is necessary to fix the principal's liability or place him in default? It is true that a guarantor

[1] (1823) 20 Johnson 365.

is entitled to make any defense which would be available to his principal; and if the principal has been discharged by the negligence of the creditor the guarantor is thereby discharged.

It is sometimes claimed that this rule applies to securities held by the creditor and that any loss of these securities by the creditor's neglect discharges the guarantor *pro tanto;* so that if the indorser of a negotiable instrument fails to make the proper presentment demand and notice thereby discharging the drawers and indorsers, the guarantor of such instrument is thus deprived of indemnity and may defend to the extent of whatever damage he has sustained in this regard.[1]

In Brown *v.* Curtis[2] the court said: "If there had been an endorser on the note prior to the guaranty, and the plaintiff had allowed him to be discharged by neglecting to demand payment and give him notice, it may be the defendant would have had a good answer to the action." Russell *v.* Hester[3] and Powell *v.* Henry[4] sustain this view. In those cases it is held that the receipt of a note before its maturity upon which there is a solvent indorser as collateral security for the payment of a debt, imposes on the creditor the necessity of doing those acts which will preserve the liability of the indorser, and if he fails to do so he is responsible for the injury sustained to the person from whom he received it. To the same effect is Trotter *v.* Crockett.[5]

There is substantial reason for the position that where one has guaranteed a negotiable instrument before maturity which has been indorsed, the holder should do whatever is required to hold the indorser, so that in the event the guarantor is required to pay, he may be subrogated to the rights of the holder to proceed against the indorser. But on the other hand it may well be claimed that the guarantor of payment must himself be diligent. He may pay the debt and make demand upon the principal and give notice to the indorser. Having failed to do so, why shall he de-

[1] 2 Am. Lead. Cases 124, citing Ex parte Mure (1788) 2 Cox Eq. Cases 63; Williams *v.* Price (1824) 1 Simon & Stewart 581; Beale *v.* Bank (Pa. 1836) 5 Watts 529; Goodloe *v.* Clay (Ky. 1845) 6 B. Monroe 236; Philips *v.* Astling (1809) 2 Taunton 206; Jones *v.* Pierce (1857) 35 N. H. 295.

[2] (1849) 2 N. Y. 225, 228. [3] (1846) 10 Ala. 535.

[4] (1855) 27 Ala. 612. [5] (Ala. 1835) 2 Porter 401.

end on the ground that the holder has not been more diligent than he has been?

In other guaranties the true rule seems to be that no demand on the debtor is required where he is already in default, as a condition precedent to an action against the guarantor. In Vinal *v.* Richardson[1] the court said: "It is true there are authorities to the effect that a demand upon the party primarily liable, and notice of his default given to the guarantor, are necessary, before any action can be maintained upon the guaranty. But the better doctrine, and that which seems to us to be best supported, both upon reasoning and authority, is that demand and notice are not essential prerequisites to an action . . . in order to establish a default by the principal and a breach of the contract declared on. The necessity for such demand and notice is not incidental to the relation of guarantor and guarantee, as it is to that of indorser and indorsee."

The courts which have held that a demand upon the maker of a past due note was necessary in order to hold the guarantor seem to have derived the doctrine from the rule applying to indorsers of commercial paper before due. They have sought to extend to guarantors, even of contracts other than commercial paper, the advantages given to indorsers, though perhaps no court has asserted that the rules apply to guarantors with the same exactness as to indorsers. Many other decisions composing the great weight of authority, are to the contrary and hold to the rule stated in Vinal *v.* Richardson.[2]

Many courts and text writers say that when the guaranty is absolute no demand on the principal is necessary but when it is conditional a demand is required. Brandt on Suretyship[3] gives a rule which in substance is found in many decisions. He says: "Whether demand of payment must be made of the principal, and notice of his default be given, in order to charge the guarantor is a question depending very much upon the nature of the particular guaranty. Where the liability of the guarantor is not direct but is collateral and dependent upon the

[1] (Mass. 1866) 13 Allen 521, 527. [2] Supra. [3] ¶ 217.

default of another, notice of such default to such guarantor within a reasonable time has been held necessary."

The mere attempt to state this rule indicates at once its defect. All guaranties are dependent upon the default of another. This indeed is the prime characteristic of a guaranty, that the guarantor will respond if the principal fails to do so. To attempt to make the distinction between collateral and absolute guaranties the test of whether a demand on the principal is necessary has led the courts into the greatest confusion. Some courts attempting to apply this rule have held that a guaranty of the payment of a promissory note is conditional and demand on the principal therefore required.[1] But the weight of authority in reason and decision is clearly to the contrary on this proposition.[2] The decisions are as much in conflict when the guaranties concern other contracts than those of promissory notes. The difficulty is found in attempting to determine what guaranties are conditional and what are absolute. The inquiry whether or not a demand has been made upon the principal generally has back of it the other question of the holder's diligence, while in fact it will generally be found that mere demand does not prove diligence by the holder. When diligence is imposed upon the holder before he may sue the guarantor he must not stop at demand, but if the guarantor's contract is a guaranty of collection the holder must proceed with diligence against the debtor, and must show that, notwithstanding the exercise of due diligence, by suit and by execution and by whatever steps ordinary diligence might dictate, he was unable to collect from the debtor. But this doctrine of diligence in proceeding on guaranties of collection is foreign to the subject of demand on the principal as a condition precedent to suing the guarantor, and should not be confused with it. Nor is the question of notice to the guarantor of the principal's default in any way determined by the necessity of demand. It is a subject distinct

[1] Talbot *v.* Gay (Mass. 1836) 18 Pick. 534; Cox *v.* Brown (N. C. 1858) 6 Jones 100; Gamage *v.* Hutchins (1844) 23 Me. 565; Sage *v.* Wilcox (1826) 6 Conn. 81; Kannon *v.* Neely (Tenn. 1849) 10 Humph. 288.

[2] Forest *v.* Stewart (1863) 14 Ohio St. 246; Walton *v.* Mascall (1844) 13 Mees. & Welsby 452; Gage *v.* Mechanics Natl. Bank (1875) 79 Ill. 62; Singer Mfg. Co. *v.* Hester (1879) 71 Mo. 91; Woodstock Bank *v.* Downer (1855) 27 Vt. 539.

in itself, and it would be a grave error to conclude that because demand is not required to place the principal in default, that therefore notice to the guarantor of such default is not necessary. On the other hand, it is often of the utmost importance to notify the guarantor of the default of the principal so that he may protect himself against loss, if possible. An examination, however, of the question of when such notice must be given will also disclose much conflict and confusion, although the cases in which it is held that notice to the guarantor is necessary, generally present clearer reasons for this position than do the cases which hold that a demand is indispensable.

The language of the court in Heyman *v.* Dooley *et al.*,[1] touching the subject of demand and notice, accords with the writer's views of the law on this subject. The court there said: "It is to be regretted that upon such a question there should be such a conflict of judicial opinion. This conflict has mainly arisen from a departure from the firmly settled rule of the common law in regard to contracts of guaranty, and the attempt to engraft upon such contracts, in a modified form it is true, the law of demand and notice by which the liability of an endorser of negotiable paper is governed. . . .

"In the case of an absolute guaranty, however, there is no condition annexed to the contract itself, nor is any condition implied by law, requiring the guarantee to notify the guarantor of the default of the principal. On the contrary, his liability is governed by the same rules of law by which the ordinary liability of one who has broken his contract is determined. And this being so, if one guarantees in absolute terms the performance of a specific act or contract by another, his liability being commensurate with that of the principal, whatever proof is necessary to support an action against the principal will be sufficient in an action against the guarantor. And as demand upon the principal is not necessary to support an action against him for a breach of his contract, it is not necessary to allege or prove notice of demand upon and default of the principal to charge the guarantor."

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[1] (1893) 77 Md. 162, 165; 26 Atl. 117.